Filed 2/7/19 P. v. Romans CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WAYNE ALLEN ROMANS, Defendant and Appellant.	2d Crim. No. B283595 (Super. Ct. No. 2014029318) (Ventura County)

Wayne Allen Romans appeals a judgment following conviction of assault with a deadly weapon, vandalism, and misdemeanor battery. (Pen. Code, §§ 245, subd. (a)(1), 594, subd. (b)(1), 242).)[1] We affirm.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns several "road rage" incidents that Romans committed against a young woman driver as she stopped at traffic signals on Victoria Avenue in Ventura. At the first signal, Romans left his vehicle and poured water on the woman

[1] All statutory references are to the Penal Code.

through her open sunroof. A short distance later, Romans rammed her vehicle with his vehicle, causing significant body damage to her vehicle and jolting her into her vehicle's console. Romans then laughed and drove away. The woman snapped a photograph of Romans's vehicle license plate and a security camera at a gasoline station captured the sunroof incident. Romans now appeals and raises issues of juror misconduct, instructional error, and impermissible case-specific hearsay evidence.

In the morning of August 18, 2014, Julianna Dasilva drove along Victoria Avenue in Ventura to attend the first day of school at the community college. When she stopped at a traffic signal at Valentine Road, she noticed Romans walk from his vehicle toward her vehicle. Through her open sunroof, he then poured a cupful of water on her.

Dasilva followed Romans to his vehicle, a brown Toyota sports utility vehicle. He entered his vehicle and closed the door. Dasilva shouted at Romans and hit his driver's side window, demanding an explanation for his behavior. Romans did not respond and laughed.

Dasilva returned to her vehicle and continued to drive north on Victoria Avenue. When she stopped at a traffic signal at Moon Drive, Romans drove along the left side of her vehicle and "rammed" his vehicle into her left-side passenger door. The impact caused body damage to Dasilva's vehicle and left tire marks on her vehicle door. The impact also "jolted" her into the center console. Romans then backed his vehicle away from Dasilva's vehicle, "flipped [her] off," and drove away. Traffic cameras captured the license plate of Romans's vehicle at the intersection of each incident.

As Romans drove away, Dasilva also photographed his license plate with her cellular telephone. She testified at trial that a person "can't just hit [her] car and drive away." Dasilva also identified Romans at trial as the driver of the Toyota sports utility vehicle.

Ventura Police Officer Gilbert Pusen investigated and identified Romans as the owner of the vehicle in Dasilva's photograph. Pusen contacted Romans who denied involvement in the incidents and stated that he recently sold the vehicle. Romans was unable to provide any information regarding the vehicle sale, however, and abruptly ended the conversation with Pusen.

Pusen obtained a video-surveillance recording from a gasoline station at the intersection of Victoria Avenue and Valentine Road. The recording reflects Romans walking to Dasilva's vehicle and moving his hand near an open sunroof before returning to his vehicle. The recording also reflects that Dasilva briefly left her vehicle and walked towards Romans's vehicle before returning to her vehicle and driving away. The prosecutor played the recording at trial.

Pusen obtained a search warrant for a search of Romans's cellular telephone records for August 18, 2014. Analysis of the records revealed that Romans's telephone was near the scene of each incident.

At trial, Romans testified and admitted pouring water through Dasilva's open sunroof. He stated that she abruptly stopped in front of his vehicle after tailgating him. Romans added that Dasilva kicked the door of his vehicle like a martial arts fighter, causing body damage to the door. Romans stated that he continued to drive north on Victoria Avenue but denied

ramming the door of Dasilva's vehicle. He testified that he sold his vehicle but then cancelled the sale and resumed possession.

The jury convicted Romans of assault with a deadly weapon, vandalism, and battery. (§§ 245, subd. (a)(1), 594, subd. (b)(1), 242).) The trial court sentenced Romans to a two-year prison term for the assault with a deadly weapon conviction, a concurrent 16-month term for the vandalism conviction, but no sentence for the misdemeanor battery conviction. The court imposed various fines and fees, ordered $3,496.77 in victim restitution, and awarded Romans 200 days of presentence custody credit.

DISCUSSION

I.

Romans appeals and contends that the trial court erred by denying his motion for a new trial based upon claims of: 1) juror misconduct; 2) failure to instruct regarding unconsciousness; and 3) impermissible evidence of case-specific hearsay.

In considering Romans's contentions, we apply the standard of review for the denial of a new trial motion: The trial court has broad discretion in ruling on a new trial motion, and the court's ruling will not be overturned absent a clear and unmistakable abuse of discretion. (*People v. Fuiava* ((2012) 53 Cal.4th 622, 730.) The court abuses its discretion, however, where it misconceives its duty or applies an incorrect legal standard. (*People v. Robarge* (1953) 41 Cal.2d 628, 633-634.)

Romans argues that the trial court prejudicially erred by not granting his new trial motion based upon the misconduct of Juror No. 3. (§ 1181, subd. 3 [grounds for new trial include juror misconduct "by which a fair and due consideration of the case has been prevented"].) He contends that Juror No. 3 formed an

opinion as to guilt prior to deliberations and was substantially biased against him. Romans asserts that the juror's bias lightened the prosecution's burden of proof and denied his constitutional rights to a fair trial and to due process of law pursuant to the United States and California Constitutions.

During closing arguments, Juror No. 3 asked if he could ask a question; the court denied the request. A few minutes later, the juror quietly uttered the word "stupid" during defense counsel's summation regarding the open sunroof incident which Romans admitted at trial. The prosecutor heard the comment which he later described as "made under the juror's breath" and "barely audible." The court reporter heard the comment, but the trial judge, the defendant, and defense counsel did not. The trial court denied Romans's motion for a new trial on the ground of juror misconduct, ruling that there was no basis to interpret the comment and no declaration from Juror No. 3, assuming the utterance occurred.

Juror misconduct raises a rebuttable presumption of prejudice. (*People v. Dykes* (2009) 46 Cal.4th 731, 809.) A trial court presented with evidence of juror misconduct must consider "whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct." (*Ibid.*) The court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*Ibid.*) A defendant is not entitled to an evidentiary hearing as a matter of right, however. A hearing should be held only when the defendant has come forward with evidence establishing a strong possibility that prejudicial misconduct has occurred. (*Ibid.*) "The trial court's decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be

reversed only if the defendant can demonstrate an abuse of discretion." (*Id.* at p. 810.)

The trial court did not abuse its discretion by not holding an evidentiary hearing because the evidence of "misconduct" did not suggest "a substantial likelihood that one or more jurors were biased by the misconduct." (*People v. Dykes*, *supra*, 46 Cal.4th 731, 809.) Romans did not present declarations from Juror No. 3 or the other jurors regarding the utterance nor did he provide evidence of the context of the sotto voce comment. Mere speculation is insufficient to support a claim of juror misconduct. (*People v. Davis* (1995) 10 Cal.4th 463, 548.) An evidentiary hearing should not be used as a " 'fishing expedition' " to search for possible misconduct, but only when the defense has come forward with evidence demonstrating a strong possibility that prejudice has occurred. (*People v. Peoples* (2016) 62 Cal.4th 718, 777.) Romans did not meet his evidentiary burden.

II.

Romans asserts that the trial court erred by not permitting him to present evidence of an unconsciousness defense based upon his prior exposure to methane gas. He contends that he was entitled to present the defense and to receive a jury instruction regarding unconsciousness or the lack of the required mental states for the charged crimes.

Prior to trial, the trial court granted the prosecutor's in limine motion to preclude evidence of Romans's involuntary intoxication due to asserted methane gas poisoning. The trial judge reasoned that Romans failed to proffer "even a modicum of evidence of unconsciousness." Romans's offer of proof was the expert opinion of a neurologist that the neurologist was "not aware of any cases in which patients were unconscious [through

gas poisoning]" and that Romans may have been aware of his behavior "but unable to control [it]." The court also properly ruled that a mental impairment instruction did not apply to the charged general intent crimes.

Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. (§ 26 ["All persons are capable of committing crimes except . . . : [p]ersons who committed the act charged without being conscious thereof"]; *People v. Halvorsen* (2007) 42 Cal.4th 379, 417; *People v. Parker* (2017) 2 Cal.5th 1184, 1223.) To constitute a defense, unconsciousness need not rise to the level of a coma or the inability to walk. It can exist "'where the subject physically acts but is not, at the time, conscious of acting.'" (*Halvorsen*, at p. 417.) Unconsciousness may be caused by blackouts, involuntary intoxication, sleepwalking or epilepsy, for example. (*People v. James* (2015) 238 Cal.App.4th 794, 805.)

The law presumes that a person who appears to act in an apparent state of consciousness is conscious. (*People v. James*, *supra*, 238 Cal.App.4th 794, 804.) Thus, a defendant bears the burden of producing evidence to rebut this presumption of consciousness. (*Ibid.*) Evidence raising a reasonable doubt whether a defendant was conscious at the time of acting is a complete defense to a criminal charge. (*Ibid.*) If a defendant produces substantial evidence of unconsciousness, the trial court must instruct regarding the defense. (*People v. Halvorsen*, *supra*, 42 Cal.4th 379, 417.) The existence of any evidence regardless of its weakness, however, does not justify an instruction regarding a defense. (*People v. Barton* (1995) 12 Cal.4th 186, 196.)

Here, insufficient evidence supports the unconsciousness instruction. Romans did not proffer evidence that his asserted

methane gas poisoning precluded him from acting of his own volition. The expert opinion of his neurologist opined that the neurologist was not aware of any cases where gas poisoning caused the patient to act in an unconscious matter. Indeed, the evidence reflects that Romans engaged in more than mere physical movement; he returned quickly to his vehicle following the first incident and laughed at Dasilva. Following the second incident, Romans quickly drove away, again laughing at Dasilva, and "flipping [her] off." Romans did not meet his burden of establishing sufficient evidence of unconsciousness to warrant an unconsciousness instruction. (*People v. Barton*, *supra*, 12 Cal.4th 186, 196.)

III.

Romans contends that the trial court erroneously permitted evidence of case-specific hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, 686. The now-objected-to statements include: 1) Pusen's testimony that the gasoline station owner corroborated the time-stamp on the surveillance videotape; 2) Pusen's testimony that FBI Special Agent Mike Easter provided information that Romans's cellular telephone was in the area of Victoria Avenue and Moon Drive in the morning of August 18, 2014; and 3) FBI Special Agent Jeff Bennett's testimony that he had reviewed Easter's report regarding the cellular telephone records and reached the same conclusions as Easter. Romans did not object to any of this evidence at trial, and also did not object to the admission of the Easter report.

Romans's claims are precluded because he did not object to this evidence on hearsay or confrontation grounds. He has forfeited any *Sanchez* claim on appeal. (*People v. Powell* (2018) 6 Cal.5th 136, 179-180 [defendant's failure to object at trial forfeits

Sanchez argument on appeal]; *People v. Redd* (2010) 48 Cal.4th 691, 730 [defendant's failure to object at trial forfeits confrontation clause claim on appeal].) At the time of Romans's trial, the *Sanchez* holding had been in existence approximately seven months and was no longer "new" law.

Moreover, assuming error for purposes of argument only, any error is harmless pursuant to any standard of review. Dasilva testified that the time-stamp on the video recording was accurate according to her memory of the events. Romans testified and admitted the sunroof incident and driving along Victoria Avenue that morning. The cellular telephone data establishing his presence during the two incidents could not have prejudiced him.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

David M. Hirsch, Judge

Superior Court County of Ventura

Imhoff & Associates, P.C., Shannon M. Dorvall for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan M. Krauss, Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.